

65546-9

65546-9

No. 65546-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TERRY,

Appellant.

2018 NOV 22 PM 3:04



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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Christopher Terry was prosecuted in connection with a robbery. There were two victims of the crime, both of whom knew Terry. One alleged that he was one of the perpetrators. The other maintained that Terry was innocent.

At trial, the State sought to impeach the second victim with his prior inconsistent statements allegedly identifying Terry as the robber. Defense counsel did not request a limiting instruction with regard to this evidence, and thereby enabled the prosecutor to use it for any relevant purpose, including as substantive evidence of guilt. In closing argument, the prosecutor made the prior statements a central theme, claiming that they corroborated the first victim's testimony.

By failing to request a limiting instruction, Terry's lawyer rendered ineffective assistance of counsel. Terry was further prejudiced by a violation of his right to confrontation. Terry's conviction must be reversed and remanded for a new trial.

## B. ASSIGNMENTS OF ERROR

1. Defense counsel denied Terry the effective assistance he was guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution when she failed to seek a limiting

instruction that would have prevented impeachment testimony from being used as substantive evidence.

2. In violation of Terry's Sixth Amendment right to confrontation, Fourteenth Amendment right to a fair trial, and ER 404(b), the trial court erroneously permitted the State to introduce evidence that the car in which Terry was arrested had been reported stolen.

3. Cumulative error denied Terry the fair trial he was guaranteed by the Fourteenth Amendment.

4. In violation of Terry's Sixth and Fourteenth Amendment rights to a jury trial and due process, the trial court erred in using juvenile adjudications to enhance his SRA offender score.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth Amendment and article I, section 22 of the Washington Constitution, an accused person is guaranteed the right to the effective assistance of counsel. Defense counsel failed to seek a limiting instruction when prior statements of a key witness were introduced in order to impeach his trial testimony. The prosecutor subsequently relied on the statements as substantive proof of guilt. Did defense counsel's failure to request an instruction that would have limited the purpose for which the

statements were considered by the jury constitute ineffective assistance of counsel? (Assignment of Error 1)

2. An accused person is constitutionally guaranteed the right to confront the witnesses against him. Barring a showing that the witness is unavailable or that the defendant had a prior opportunity to cross-examine, the admission of testimonial hearsay is a constitutional error. The trial court admitted testimonial hearsay that the car in which Terry was arrested had been reported stolen. Did the admission of this testimony violate Terry's right to confrontation? (Assignment of Error 2)

3. Under ER 404(b), evidence of other bad acts must be excluded unless the evidence (1) is material towards establishing an essential ingredient of the crime charged; (2) is more prejudicial than probative; and (3) is proven to have occurred by a preponderance of the evidence. The trial court failed to identify a non-propensity purpose for the admission of evidence that the car in which Terry was arrested had been reported stolen, and the evidence was highly prejudicial in that it was likely to sway the jury into believing that Terry was disposed towards committing criminal acts. Did the admission of the evidence violate Terry's right to a fair trial and ER 404(b)? (Assignment of Error 2)

4. Even where no single error may require reversal, under the cumulative error doctrine, individual errors may combine together to deny an accused person a fair trial. Did cumulative error deny Terry a fundamentally fair trial? (Assignment of Error 3)

5. The Sixth Amendment guarantees a criminal defendant the right to a jury trial on every element of the charged offense, and the Fourteenth Amendment guarantees due process of law. The sentencing court included 12 juvenile adjudications in Terry's criminal history even though he did not have the right to a jury trial in the juvenile proceedings. Did the court violate Terry's constitutional rights to a jury trial and to due process when it included the prior juvenile adjudications in his criminal history and in the calculation of his offender score, thus increasing the punishment that could be imposed? (Assignment of Error 4)

D. STATEMENT OF THE CASE

On the morning of October 4, 2009, two assailants entered the home of Raesean Walton and Tameisha Hutton. RP 171-72.<sup>1</sup> They woke Walton and demanded he give them money stored in a safe in Walton's bedroom. RP 172-73. Both men were large, light-

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<sup>1</sup> The trial proceedings are contained in consecutively paginated volumes and are referenced herein as "RP" followed by page number.

skinned African American men with braided hair. RP 196. Walton had not seen either man before. RP 172, 194.

The more aggressive of the men threatened “to whup” Walton’s “ass.” RP 172. Although the men were unarmed, Walton was fearful for his and Hutton’s safety, and complied with their demand for the money from the safe. RP 175-76. According to Walton, the only person other than Hutton who knew about the existence of the safe was his friend Larry, who had helped him move the safe into their house. RP 193.

Hutton telephoned 9-1-1. She initially stated that she did not know the men who robbed her and Walton, but later in the telephone call she identified one of them as Christopher Terry, a friend of Walton. RP 135. When asked by police officers to make an identification from a photo montage, Hutton again identified Terry. 165-66.

Terry was arrested and charged by amended information with robbery in the first degree. RP 213; CP 5. At trial, Hutton testified that Terry, whom she stated she knew well because he was Walton’s friend, came to their house with another man and robbed them at gunpoint. RP 74-110. A jury convicted Terry as charged. CP 35. This appeal follows.

E. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO ENSURE THAT EVIDENCE ADMITTED SOLELY FOR PURPOSES OF IMPEACHMENT WAS NOT USED AS SUBSTANTIVE EVIDENCE DENIED TERRY THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT.

a. Defense counsel did not seek to restrict the jury's consideration of the State's impeachment of Walton for its limited purpose, and did not object when the State repeatedly urged the jury to use the impeachment testimony substantively. At trial, Walton steadfastly maintained that Terry was not one of the individuals who robbed him and Hutton. RP 172, 184. The prosecutor confronted Walton with alleged prior statements to police officers in which he supposedly said that he did not know why Terry targeted them or that Terry was the person who robbed them. RP 195, 197. Walton denied making these statements, and the State sought the court's permission to impeach Walton's testimony. RP 195, 197. Defense counsel conceded that the evidence rules would permit such impeachment. RP 207. She did not ask the court for a limiting instruction to ensure the impeachment testimony would not be considered for substantive purposes.

Subsequently, two prosecution witnesses, Seattle police officer Kevin Nelson and Detective Frank Clark, testified about Walton's prior statements. Nelson, who was one of the officers that responded to Hutton's 9-1-1 call, testified that although Walton refused to provide a statement, he did say that he had known Terry for about 10 years, and he did not know why Terry had targeted him or "why [Terry] did this." RP 233. Clark testified that he telephoned Walton to see if he could persuade him to give a statement. Walton declined, but according to Clark he admitted during this telephone call that he was robbed at gunpoint, and that Terry came to his house and took money from him. RP 252.

Defense counsel did not request a limiting instruction when this testimony was introduced. Although defense counsel submitted a packet of proposed jury instructions, defense counsel did not submit any instruction pertaining to the impeachment testimony. CP 12-15.

During closing argument, the substantive value of the impeachment evidence was a principal theme of the prosecutor's summation. In her initial presentation, the prosecutor explicitly instructed the jury that they could use the impeachment evidence as proof of Terry's guilt. She argued, "Even Mr. Walton told

Detective Clark shortly after this incident that, yes, the defendant had a gun, and yes, he was robbed at gunpoint by the defendant.”

RP 294. She stated, “Ms. Hutton and Mr. Walton certainly believed it was a real gun at the time.” Id. She then argued,

Ladies and gentlemen, you may also consider Mr. Walton’s prior statements in thinking about corroboration for Ms. Hutton’s testimony. Mr. Walton distinctively told Officer Nelson that he had known the defendant for ten years, and that he did not understand why the defendant targeted him and robbed him that morning.

. . . .

A couple of weeks after this happened, within a short amount of time, Mr. Walton told Detective Clark, again reiterated that the defendant robbed him at gunpoint, and the defendant was the one who demanded money, came into his house with a gun, and the defendant is the one that he turned over that money to, the defendant again was the one who robbed him. You are allowed to consider his prior statement in considering whether or not that corroborates Ms. Hutton’s account.

RP 294-95.

In her rebuttal argument, the prosecutor returned to this theme, emphasizing, “Mr. Walton also knows exactly who did it, and he was very clear to Officer Nelson when he said, ‘I don’t know why the defendant targeted me.’ And Mr. Walton was very clear to

Detective Clark when he said that the defendant robbed him at gunpoint.” RP 311.

Defense counsel did not object at any time during the prosecutor’s argument.

b. Impeachment evidence is solely relevant to a witness’ credibility and may not be used as substantive evidence of guilt. Where a witness testifies inconsistently with a prior out-of-court statement of material fact, the witness may be impeached with the statement, even if it would otherwise be inadmissible. State v. Clinkenbeard, 130 Wn. App. 552, 559, 123 P.3d 872 (2005); ER 607; ER 613. If the impeachment is by extrinsic evidence, the witness must first be afforded an opportunity to explain or deny the statement. ER 613(b). The prior statement is then solely relevant to assess the witness’ credibility. It is not probative of the substantive facts encompassed by the evidence. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987).

“To be nonhearsay when offered to impeach, a prior statement must cast doubt on credibility without regard to the truth of the matters asserted in it.” State v. Allen S., 98 Wn. App. 452, 467, 989 P.2d 1222 (1999) (emphasis in original). The comparison between a witness’ prior statement and trial testimony, “without

regard to the truth of either statement, tends to cast doubt on the witness' credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not.” Id. (emphasis in original). “Thus, to the extent that a witness’ own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible ‘to impeach.’” Id. (emphasis in original).

Because such evidence cannot be used as substantive proof of guilt, the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible. . . . The concern behind this prohibition is that prosecutors will exploit the jury’s difficulty in making the subtle distinction between impeachment and substantive evidence.

Clinkenbeard, 130 Wn. App. at 569-70 (citations omitted).

Due to the potential that juries will misunderstand impeachment evidence, a limiting instruction is available whenever the State seeks to impeach a witness. See State v. Brown, 113 Wn.2d 520, 530, 782 P.2d 1013 (1989). However, absent a request for a limiting instruction, evidence admitted for purposes of impeachment may be considered as substantive proof of guilt. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

c. Defense counsel rendered ineffective assistance of counsel under the Sixth Amendment when she failed to request a limiting instruction or object when the State used the impeachment testimony as substantive evidence of guilt. An accused person has the right under the Sixth Amendment and article I, section 22 of the Washington Constitution to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 122 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel has two components: (1) deficient performance and (2) resulting prejudice, i.e., that but for counsel's deficient performance, there is a reasonable probability the verdict would have been different. Strickland, 466 U.S. at 687. An ineffective assistance of counsel claim is reviewed de novo. State v. Grier, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

Although a reviewing court indulges the presumption that defense counsel was effective, this presumption can be overcome if the defendant can show that there was no legitimate strategic or tactical basis for the challenged conduct. “[D]eliberate tactical

choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance.” Id. at 640. If the tactic was unreasonable, the Court will reverse. Id. at 633.

i. Defense counsel’s failure to seek a limiting instruction was deficient performance. With respect to limiting instructions, the court generally presumes that trial counsel decided not to request a limiting instruction as a trial tactic so as not to reemphasize damaging evidence. State v. Barber, 38 Wn. App. 758, 771 n. 4, 689 P.2d 1099 (1984). Where there is no reasonable tactical basis for the claimed “strategy”, however, the failure to seek a limiting instruction is deficient performance. See State v. Fisher, 165 Wn.2d 727, 758, 202 P.3d 937 (2009) (Madsen, J., concurring). Here, any hypothetical “strategy” not to seek a limiting instruction would have been objectively unreasonable.

An acquittal depended entirely upon the jury having a reasonable doubt that Terry was one of the individuals who robbed Walton and Hutton. Walton testified that the men who robbed him were strangers. RP 172. His prior statements allegedly identifying Terry as the person who “targeted” him and robbed him “at

gunpoint” were relevant only inasmuch as they tended to cast doubt on his credibility. Allen S., 98 Wn. App. at 467. They were not admissible for the truth of the matter asserted and under the rules of evidence could not be used by the jury for this purpose. Id.

Nevertheless, defense counsel either chose not to request a limiting instruction or was unaware that Terry was entitled to one. Her omission authorized the jury to consider the impeachment testimony “for any relevant purpose”, including the truth of the matter asserted. Myers, 133 Wn.2d at 36.

The prosecutor repeatedly told the jury that they could consider Walton’s prior statements as corroboration of Hutton’s testimony – i.e., for their substantive value. RP 294-95. Far from deemphasizing the damaging evidence, the prosecutor made this evidence the linchpin of her case. At a minimum, a limiting instruction would have established that the jury could consider Walton’s statements only inasmuch as they affected his credibility. In this trial, a limiting instruction would have had the added desirable effect of precluding the prosecutor from urging the jury to use the statements as substantive proof of guilt.

In her closing argument, defense counsel told the jurors that they should believe Walton’s trial testimony, noting, “[H]e was really

quite clear that Mr. Terry did not do this.” RP 309. There thus was no conceivable legitimate strategic reason for defense counsel to not request a limiting instruction or object to the prosecutor’s arguments urging the jury to weigh Walton’s prior statements as substantive proof of guilt. Defense counsel’s failure to protect the evidence provided by Terry’s most significant witness was deficient performance.

ii. Terry was prejudiced by defense counsel’s failure to ensure the impeachment evidence was not used substantively. The second prong of Strickland requires Terry to establish that he was prejudiced by his lawyer’s deficient strategy. Strickland, 466 U.S. at 687; Grier, 150 Wn. App. at 644. Prejudice is amply evident on this record.

Only two witnesses were present during the charged robbery. The first, Hutton, alleged that Terry, Walton’s old friend, was one of the perpetrators. The second, Walton, maintained that both men were strangers, that Terry was not involved, and that only his friend Larry knew about the safe. RP 172, 184, 193. Defense counsel’s failure to seek a limiting instruction gave the prosecutor free rein to use the prior statements as she wished, even though normally the evidence could only have been considered for

impeachment. The prosecutor's use of the impeachment evidence fatally compromised Terry's defense. But for counsel's deficient performance, there is a reasonable probability that the verdict would have been different.

2. THE ADMISSION OF EVIDENCE THAT THE CAR IN WHICH TERRY WAS ARRESTED HAD BEEN REPORTED MISSING VIOLATED TERRY'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

a. The trial court permitted the State to introduce evidence that the car in which Terry was arrested was reported missing even though this evidence was testimonial hearsay.

Hutton reported to police that Terry drove away from her home in a maroon car. RP 81, 109. Hutton told the 9-1-1 operator that she was able to see the license plate of the car and that it contained the numbers 090. RP 109. Terry was arrested in a maroon Toyota Corolla, with the license plate 090 SEP. RP 212.

Prior to trial, Terry's lawyer moved to prohibit testimony that the car in which Terry was arrested had been reported stolen. RP 46. Defense counsel conceded that the evidence that the car was similar to the description provided by Hutton was relevant, but argued that any evidence the car had been reported stolen was prejudicial hearsay. RP 46-47. She noted that it had not been

possible to interview the individual who reported the car as stolen, and argued that for the police officer who took the stolen vehicle report to testify to this fact violated Terry's right to confrontation. Id.

The trial court initially agreed that the officer who stopped the car should only be permitted to testify to its description, but reserved ruling on the question whether to limit the testimony of the officer who took the stolen vehicle report. RP 61. After taking the matter under advisement, the court ruled that the State would be permitted to elicit evidence that the car did not belong to Terry, and that the officer who took the stolen vehicle report would be allowed to testify to the fact of the report in the relevant time frame and that Terry was found in the car. RP 63-64.

At trial, Officer Benjamin Kelly testified that on October 4, 2009, he took a report of a missing vehicle, a Toyota Corolla with the license plate 090 SEP, and that neither person making the report was Terry. RP 263-65.

b. The admission of the testimony that the vehicle was reported missing violated Terry's Sixth Amendment right to confrontation. Under the Sixth Amendment, an accused has a right to confront the witnesses against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "[T]he

'principal evil' at which the clause was directed was the civil-law system's use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases." State v. Jasper, \_\_\_ Wn. App. \_\_\_, 240 P.3d 174, 179 (2010) (citation omitted). Barring a showing that the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of "testimonial" statements of a witness who does not take the witness stand at trial. Crawford, 541 U.S. at 53-54.

"[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial", such as statements to police officers during the course of a criminal investigation, fall within the "core class" of "testimonial" statements contemplated by the Sixth Amendment. Id. at 52-53; see also State v. Koslowski, 166 Wn.2d 409, 426-27, 209 P.3d 479 (2009) (analyzing circumstances in which statements made to police officers will be testimonial); State v. McDaniel, 155 Wn. App. 829, 846-47, 230 P.3d 245 (2010) ("statements are testimonial if the primary purpose of questioning is to establish or prove past events potentially relevant to later criminal prosecution and circumstances

objectively indicate that there is no ongoing emergency”). An alleged Confrontation Clause violation is reviewed de novo.

McDaniel, 155 Wn. App. at 839.

Without question Officer Kelly’s testimony about the “missing vehicle” report violated Terry’s right to confrontation. First, the individuals who made the report did not testify at trial and Terry did not have a prior opportunity to confront them. RP 46-47. Second, Kelly lacked personal knowledge of the facts to which he testified. The matter asserted – that the vehicle in question was “missing” – was information that Kelly obtained in the course of interviewing the unavailable complainants. RP 263-65. Third, these statements were made for the purpose of filing a police report, a circumstance which would lead an objective witness to understand that they would be available for use at a later trial.

The State may attempt to argue that because the State introduced evidence that the vehicle was registered to someone other than Terry,<sup>2</sup> there was no error. Such an argument obfuscates the issue. The motor vehicle registration simply established that the car belonged to someone other than Terry. This is not an unusual or suspicious circumstance. It is certainly

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<sup>2</sup> At trial, the State introduced certified copies of the vehicle registration. RP 216.

conceivable, even natural, to assume that someone would drive another person's car.

However the testimony that the vehicle had been reported missing led to the inference that Terry was driving the car without the owner's permission, or that he had stolen it. As defense counsel correctly pointed out, this evidence was highly prejudicial, and wholly irrelevant to the question whether Terry was the person who had robbed Walton and Hutton. RP 46-47.

Furthermore, the evidence was unreliable. The stolen vehicle allegation did not result in a conviction. Id. And because the individuals who reported the vehicle as stolen did not make themselves available to be interviewed or called as witnesses at trial, the truth of the allegation was not "tested in the crucible of cross-examination." Crawford, 541 U.S. at 61.

It is not clear why the court believed the evidence that the car was reported "missing" was admissible. In permitting the State to present Kelly's testimony, the court rationalized that the State would also introduce the Department of Licensing registration for the vehicle. RP 64. But, as established, the bare fact that the car did not belong to Terry did not prove that he was driving the car

without the owner's permission. The admission of Kelly's testimony violated Terry's right to confrontation.

c. The error was prejudicial. Admission of evidence in violation of the "bedrock" right of confrontation requires reversal unless the State proves beyond a reasonable doubt the uncontroverted evidence did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict).

In McDaniel, the Court noted that the State had presented compelling evidence of McDaniel's guilt, based in part on the strength of positive identifications by the victim. 155 Wn. App. at 852. Nevertheless, the Court found that a Confrontation Clause violation which enabled a police officer to identify McDaniel by a prejudicial nickname, "Tony Guns," was likely to have persuaded the jury to convict. Id. The Court concluded that the remaining evidence was not so overwhelming as to satisfy the State's high burden with regard to constitutional error. Id. at 852-53.

Here, similar to McDaniel, the evidence of Terry's guilt was not overwhelming. Although the State had one witness who testified that Terry had committed the robbery, another witness offered a very different version.

Walton maintained that he did not know the people who robbed him. RP 172. He said that Terry was a friend and welcome in his home anytime. RP 184-87. Hutton averred that Terry was the robber, but Hutton's story was inconsistent, and portions of it were not credible. For example, at trial Hutton maintained that a friend, "Patch," was in the home when Terry and his companion entered, and that "Patch" witnessed the events that transpired. RP 124, 140. Walton, however, said no other persons were in the home, and he denied even knowing anyone named "Patch." RP 177. The police officers who responded to the 9-1-1 call never saw a third person in the home, and Hutton did not mention "Patch" or anyone else to them while they were conducting their investigation. RP 234, 256.

Terry cooperated with the police interrogation. He freely admitted that he was a longtime friend of Walton and that he had been in Walton's house before. RP 249-50. He denied having committed the robbery. RP 250.

The admission of the evidence that the car Terry was arrested in had been reported missing by its owner enabled the State to paint Terry as a thief as well as a robber. By presenting Terry as someone with a propensity to commit crimes, the State made it easier for the jury to discount the inconsistencies between the testimony of the two victims. This Court should conclude that the Confrontation Clause violation was prejudicial.

3. THE EVIDENCE THAT THE CAR HAD BEEN REPORTED MISSING BY ITS OWNER WAS IRRELEVANT AND PREJUDICIAL PROPENSITY EVIDENCE AND SHOULD HAVE BEEN EXCLUDED UNDER ER 404(b).

In finding Kelly's testimony that he had taken a missing vehicle report from the car's owner was admissible, the court also failed to assess its tendency to persuade the jury that Terry had a propensity to engage in criminal acts. Had the court conducted the requisite analysis under ER 404(b), the court would have concluded that the testimony was solely relevant as propensity evidence, and excluded it.

a. ER 404(b) prohibits the admission of propensity evidence unless it is relevant and material to proving an essential ingredient of the crime. Under ER 404(b), a court is prohibited from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove

the character of a person in order to show action in conformity therewith.” ER 404(b). “This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (quoting State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007)).

Where the State seeks to introduce propensity evidence, the trial court first must analyze whether the evidence is necessary to prove an “essential ingredient” of the crime charged “rather than simply to show the defendant had a propensity to act in a certain manner which he followed on that particular occasion.” State v. Sanford, 128 Wn. App. 280, 285, 115 P.3d 368 (2005). Second, the court must evaluate the evidence’s relevance – i.e., whether its probative value is outweighed by its prejudicial effect. Id. Third, the court must issue a limiting instruction to ensure the evidence is not considered for its propensity purpose. Id. The other misconduct may not be admitted unless the court finds by a preponderance that it occurred. Foxhoven, 161 Wn.2d at 175.

b. The evidence was immaterial, irrelevant, prejudicial, and should have been excluded. The trial court did not

engage in the requisite analysis before concluding the evidence that the car had been reported missing could be admitted. The court thus conflated two issues in admitting the evidence: (1) the fact that Terry was arrested in a car that was similar to the car used as a getaway vehicle by Hutton and Walton's assailant, which concededly was relevant, and (2) the fact that Terry was driving the car without its owner's permission, which was not.

The State did not articulate any credible basis for admission of the prejudicial and irrelevant evidence that the car had been reported missing. And there was no reason for this evidence to come in at trial. To the extent that the evidence may have been offered to prove identity, this was shown by the fact of Terry's arrest in the car. The additional hearsay evidence about the car having been stolen was in no way probative of any essential ingredient of the crime.

"[T]o be admissible under ER 404(b), the prior misconduct must, in some tangible way, link the defendant to the crime charged." Sanford, 128 Wn. App. at 286 (citing 5D Karl B. Tegland, Courtroom Handbook on Washington Evidence ch. 5, at 225 (2005)). Evidence that the car Terry was driving had been reported missing by its owner did not link Terry to the crime charged. It was

probative of nothing save the inference that Terry had a propensity to commit criminal acts.

Even the fact that Terry was not the car's legal owner should have been excluded, as this also raised an inference that Terry could have stolen the vehicle or come into possession of it by nefarious means. Like the hearsay testimony about the car being reported missing that was elicited from Kelly, this evidence in no way enhanced the State's proof that Terry was the individual who robbed Walton and Hutton. The evidence should have been excluded.

#### 4. CUMULATIVE ERROR DENIED TERRY HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect

of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court decides that the trial errors set forth above do not individually necessitate reversal, this Court should conclude that under the cumulative error doctrine, reversal is required.

5. TERRY SEEKS TO EXHAUST HIS STATE REMEDIES AND ASKS THIS COURT TO HOLD HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INCLUSION OF A JUVENILE ADJUDICATION IN HIS SRA OFFENDER SCORE.

a. Juvenile adjudications were used to elevate Terry's offender score and maximum punishment. Terry was convicted of one count of robbery in the first degree. CP 35. In calculating his offender score, the court included four adult convictions and 12 prior juvenile adjudications. CP 157. Using the juvenile adjudications, the court arrived at an offender score of 10, at the top end of the SRA sentencing grid. CP 152. Based on this

offender score, Terry's standard sentencing range was 129-171 months in custody. Without the juvenile adjudications, the maximum punishment that the court could have imposed was 68 months confinement. RCW 9.94A.510.

b. The use of juvenile adjudications to elevate Terry's maximum punishment violated his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law. It is now axiomatic that an accused person's constitutional rights to a jury trial and due process of law require the government to submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Cunningham v. California, 549 U.S. 270, 290-91, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); United States v. Booker, 543 U.S. 220, 243-44, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 239-52, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Only prior convictions are excepted from this rule, Almendarez-Torres v. United States, 523

U.S. 224, 243, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and this is because a prior conviction “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” Jones, 526 U.S. at 249; accord Apprendi, 530 U.S. at 488.

In United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit evaluated the Supreme Court’s opinions in Apprendi, Jones, and Almendarez-Torres to determine whether juvenile adjudications which do not afford the right to a jury trial fall within the narrow prior conviction exception. Concluding they did not, the Court held Jones’s recognition of the exception’s viability was premised on the prior convictions being subject to the “fundamental triumvirate” of procedural protections – notice, proof beyond a reasonable doubt, and a jury trial guarantee – crucial to due process. Tighe, 266 F.3d at 1193-94.

At least three states have barred the use of non-jury juvenile adjudications to enhance a sentence above the otherwise-available maximum. State v. Harris, 118 P.3d 236 (Ore. 2005); State v. Chatman, 2005 Tenn. Crim. App. LEXIS 368, No. M2003-00806-CCA-R3-CD, appeal denied by, 2005 Tenn. LEXIS 940 (2005); State v. Brown, 879 So.2d 1276 (La. 2004), cert. denied,

543 U.S. 826 (2004). Other courts have appeared to concur in dicta that whether a juvenile adjudication may be utilized to elevate the punishment turns on whether there was a jury trial right in the juvenile proceeding. See e.g. State v. Greist, 121 P.3d 811 (Alas. 2005) (Alaska grants jury trial right to minors in delinquency proceedings for conduct that would be a crime resulting in incarceration if committed by an adult; only these adjudications may enhance a sentence above the otherwise-available maximum); People v. Taylor, 850 N.E. 2d 134 (Ill. 2006) (noting conflicting authorities, and relying on statutory exclusion of juvenile adjudications from definition of “conviction” to bar their use to enhance sentence).

In Weber, a five-justice majority of the Washington Supreme Court sided with the courts that have found the jury trial guarantee a dispensable right, and so held that whether a prior adjudication may be used to enhance a sentence turns on its reliability, not whether a jury trial right was afforded in the prior proceeding. Weber, 159 Wn.2d at 255. But neither the history of the Sixth Amendment nor the opinions of the United States Supreme Court provide a basis for substituting the right to a jury trial with some other, lesser, process.

To the contrary, as the Blakely opinion made clear, such a reading of Apprendi is fundamentally mistaken:

Our commitment to Apprendi. . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict.

542 U.S. at 305-06.

The reliability analysis engaged in by the Weber majority also fails to account for the differences between the juvenile and adult systems, and accordingly does not address the reason why the due process safeguards required for a juvenile adjudication are less than what is required for an adult conviction.

The juvenile justice system emphasizes rehabilitation rather than assigning criminal responsibility and punishment. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 641 (1971) (plurality opinion). The reason proffered for a less formal and less reliable procedure in juvenile court is that it

protects juveniles from the stigma and consequences of conviction as adults. Cf., McKeiver, 403 U.S. at 540 with Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (jury trial in criminal cases is fundamental to our system of justice). Thus while juveniles are entitled to some of the procedural protections necessary to ensure due process, Gault, 387 U.S. at 31-58, the McKeiver plurality refused to require a jury trial for juveniles on the grounds that it would “remake the juvenile proceeding into a fully adversary process” and end “the idealistic prospect of an intimate, informal protective proceeding.” McKeiver, 403 U.S. at 545.

Notwithstanding a legislative shift toward making the juvenile system more punitive, Washington has continued to assert that juvenile rehabilitation remains the paramount focus of the juvenile system. See State v. Chavez, 163 Wn.2d 262, 269-70, 180 P.3d 1250 (2008); State v. Watson, 146 Wn.2d 947, 952-53, 41 P.3d 66 (2002); Monroe v. Soliz, 132 Wn.2d 414, 419-20, 939 P.2d 205 (1997); State v. Meade, 129 Wn. App. 918, 925, 120 P.3d 975 (2005); State v. J.H., 96 Wn. App. 167, 183, 978 P.2d 1121 (1997). Washington courts still cite the rehabilitative goals of the juvenile justice system as a basis to deny jury trials to juveniles under both

the federal and state constitutions. State v. Tai N., 127 Wash. App. 733, 738-39, 113 P.3d 19 (2005). Yet, as the Louisiana Supreme Court recognized, when a court enhances a sentence based on prior juvenile adjudications, the adjudications themselves become criminal in nature, undercutting the rehabilitative purpose of the juvenile system.

The majority opinion of the Washington Supreme Court refused to recognize this bait-and-switch and so does not identify a due process impediment to the use of juvenile adjudications to enhance the offender score. More importantly, the opinion discounts the significance of the Sixth Amendment jury trial guarantee and so does not follow the Supreme Court's decisions. See Weber, 159 Wn.2d at 261 ("Jones . . . advances the guaranties of 'fair notice, reasonable doubt, and jury trial' as one possible, not the exclusive, basis for the distinctive constitutional treatment of recidivism"); and at 263 ("the Apprendi Court did not specifically identify a jury trial as being a required procedural safeguard").

As found by the dissenting justices, the opinion is fundamentally inconsistent with the Supreme Court's reasons for excluding prior convictions from the Sixth Amendment requirement that facts which increase the penalty for a crime beyond the

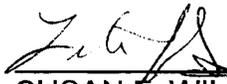
prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt, and condones a significant violation of due process. See Weber, 159 Wn.2d at 279-88 (Madsen, J., dissenting). This Court should find that Weber misapprehends federal constitutional law pertaining to the Sixth Amendment right to a jury trial right and hold the use of juvenile adjudications to elevate Terry's maximum punishment violated his rights to a jury trial and due process of law.

F. CONCLUSION

This Court should conclude that Terry was denied the effective assistance of counsel and the right to confrontation, reverse his conviction, and remand for a new trial. In the alternative, this Court should reverse Terry's sentence and remand with direction that his juvenile adjudications be excluded from his offender score.

DATED this 20<sup>th</sup> day of November, 2010.

Respectfully submitted:

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